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Supreme Court, U.S.
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No. 00-1674

IN THE

Supreme Court of the United States

DOWELANCO, EPCO, INC. and ROFAN SERVICES INC.,

Petitioners,

v.

LIBBY SLEATH, MARY ANN HAYES, GLENDA TRUESDELL and MARY OWEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF

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REPLY ARGUMENT

I. THE DECISION BELOW IS FINAL FOR PURPOSES OF THIS COURT'S JURISDICTION.

A. Reversal by this Court Would Terminate Litigation on the Relevant Cause of Action.

In arguing that this Court's reversal of the decision below would not terminate litigation on the relevant cause of action within the meaning of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), respondents misunderstand that requirement and are not candid about their claims. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136v(b), preempts States from imposing any pesticide labeling requirement in addition to or different from those required by FIFRA. Given FIFRA's broad definition of labeling — which includes all written, printed or graphic matter accompanying the pesticide at any time, 7 U.S.C. § 136(p)(2)(A) — this preemption provision forbids States from requiring a pesticide manufacturer to say anything about the pesticide other than what the federal law requires to be said in the labeling accepted by the United States Environmental Protection Agency (EPA).

The relevant "cause of action" within the meaning of *Cox Broadcasting*, therefore, is any state law claim that attacks the adequacy of the EPA-accepted labeling. This includes any claim having as an element of liability that the pesticide manufacturer failed to provide information — whether not enough, or in any other way different from, what the EPA-accepted labeling says. Simply put, the relevant cause of action includes all state law claims for failure to warn. *See, e.g., Papas v. Upjohn Co.*, 985 F.2d 516, 518-20 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993).

In this case, respondents invoked various state law theories of liability in alleging their claims — negligence, design defect, implied and express warranty — but they pleaded and asserted failure to warn *under each of these state law theories*. The state court so found in detail. Pet. App. 38a-42a. Respondents elsewhere acknowledge that they assert claims for "failure-to-warn." Resp. Br. 12, 13. This is the cause of action on which reversal by this Court will end the litigation — all claims, regardless of their state law names, that have as an element of liability that the pesticide manufacturer violated a state law duty to warn. *See, e.g., Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563-65 (1st Cir. 1996) (FIFRA preempts not only failure-to-warn claim pleaded as such, but also warranty, design defect and manufacturing defect claims that "attack[ ] . . . the failure to warn against residential use").

FIFRA preemption and the *Cox Broadcasting* requirement concerning the relevant cause of action are controlled by federal law and the substance of the claims at issue, not by state law names and pleading tactics. *See, e.g., Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("It is true that not one of the three counts of respondent's state-court complaint mentions the word 'abandonment,' but compliance with the [preemptive] intent of Congress cannot be avoided by mere artful pleading").

B. Failure to Review the Decision Below Now May Seriously Erode Federal Policy Under FIFRA.

Under 7 U.S.C. § 136v(b), a State may not require a pesticide manufacturer to say anything about the pesticide other than what the EPA-accepted labeling says. Nevertheless, the decision below holds that States may

impose damages liability against pesticide manufacturers for not saying something other than what the EPA-accepted labeling says. The *in terrorem* effect — the threat of damages liability for not doing something federal law forbids the States from requiring — may seriously erode federal policy within the meaning of *Cox Broadcasting*. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 177-81 (1988).

Here, the threat to erode federal policy is greatly magnified by the ground for the Montana Supreme Court's decision — deference to the Brief *Amicus Curiae* for the United States filed in an unrelated case in the Supreme Court of California (EPA *Amicus* Brief). Pet. App. 15a-16a; *see id.* at 47a *et seq*. The EPA *Amicus* Brief affirms that States may not require labeling changes for pesticides. Pet. App. 82a-83a. The EPA *Amicus* Brief acknowledges that this prohibition extends to court actions, such as for injunctive relief to require labeling changes. *Id.* at 82a n.22. But, the EPA *Amicus* Brief says that States may impose damages liability on pesticide manufacturers for not changing the labeling. *Id*. at 82a-83a.

That proposition is directly contrary to decisions of this Court. Where States may not compel conduct as a matter of federal law, they may not impose damages liability for failure to do that which they may not compel. Pet. 8-9 (discussing *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); and *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also BMW of North America v. Gore*, 517 U.S. 559, 572 n.17 (1996); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981)). The contrary proposition in the EPA *Amicus* Brief, which is its central rationale, and the decision below that implements it are a direct and immediate threat to erode federal policy concerning labeling under FIFRA.

The point is illustrated by a recent change in the labeling for the pesticides involved here.[1] The permitted uses, and therefore the labeling, were modified, *inter alia*, so as generally not to permit residential use. *See* 66 Fed. Reg. 7753, 7758 (Jan. 25, 2001). However, exceptions were made where uses of the pesticides are necessary to protect the public health, including fire ant and mosquito control. *Id.* Thus, the EPA in balancing the risks and benefits determined that the pesticides should be available for certain residential uses required to protect the public health. The preemption afforded by 7 U.S.C. § 136v(b) guarantees that if manufacturers include EPA-accepted labeling for such public health uses with their products, they will not be held liable in damages by state courts and juries second-guessing the EPA's determination. This, in turn, encourages manufacturers to allow their pesticides to be put to these public health uses. Under the decision below and the EPA *Amicus* Brief's position, however, States may impose liability and damages against manufacturers for labeling statements relating to these public health purposes — *i.e.*, for saying exactly what the EPA decided should be said.[2]

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1. Respondents erroneously assert (Br. 2) that the EPA "banned almost all uses" of the pesticides. In fact, the EPA and manufacturers of the active ingredient in the pesticides agreed to eliminate certain uses of the products, after which companies holding the registrations for the pesticides asked the EPA to change their registrations. *See* 65 Fed. Reg. 69518, 69519-23 (Nov. 17, 2000); 66 Fed. Reg. 7753, 7753-54 (Jan. 25, 2001). As shown by the Federal Register entries, the pesticides will continue to be used for many purposes. *Id.* Moreover, the registration changes do not involve the vast majority of agricultural uses for the pesticides. *See id.*

2. The point is actually far broader. The EPA in balancing risks and benefits determined that the pesticides should be available for a

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II. NOTHING ABOUT THIS CASE MAKES IT A "POOR VEHICLE" FOR REVIEW.

Respondents' "bystander" argument based on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), and *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989), makes nonsense of the federal statute. Subsection "a" of FIFRA's preemption provision, 7 U.S.C. § 136v(a), provides (with certain exceptions) that "[a] State *may* regulate the *sale or use* of any federally registered pesticide . . . ." *Id.* (emphasis added.) Consistent with § 136v(a), *Mortier* and *Jorling* hold that States may regulate pesticide *use* by requiring the *user* to inform bystanders or other third parties. 501 U.S. at 600, 614; 874 F.2d at 116.

In contrast, subsection "b" of the preemption provision, 7 U.S.C. § 136v(b) — the subsection at issue in this case — provides that States *may not* require *labeling* in addition to

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variety of uses required to serve a variety of economic and other consumer interests. For example, while "indoor non-residential" uses were deleted, exceptions were made for "ship holds, industrial plants, manufacturing plants, food processing plants, containerized baits in CRP (child resistant packaging), and processed wood products treated during the manufacturing process at the manufacturing site or at the mill." 66 Fed. Reg. at 7758. Similarly, in a category of outdoor use, exceptions included many specific uses as varied as "golf courses," "road medians," and "manhole covers." *See id.*

Respondents' statement (Br. 18) that "on the EPA-approved label attached to containers of Dursban, DowElanco voluntarily warranted the safety of the product" is egregiously wrong. The labels for federally-registered pesticides do not contain any warranty of safety. EPA regulations explicitly prohibit any claims as to the safety of a pesticide or its ingredients. 40 C.F.R. § 156.10(a)(5)(ix).

or different from that required by federal law. *Mortier* and *Jorling*, which are limited entirely to regulation of pesticide use, do not say States may regulate labeling by the pesticide manufacturer. Indeed, respondents' contrary suggestion is refuted by the EPA *Amicus* Brief, which reiterates that States may not impose labeling requirements. Pet. App. 82a & n.22.

Furthermore, FIFRA's regulatory scheme and the EPA's regulations demonstrate that any requirement that pesticide manufacturers provide information relating to bystanders or other third persons is a *labeling* requirement. When the EPA decides that information should be provided to third persons, it requires the manufacturer to place such a direction for use in the pesticide labeling.[3] Because it is a violation of federal law to use a pesticide in a manner inconsistent with its labeling (7 U.S.C. § 136j(a)(2)(G)), the pesticide user, such as a commercial applicator, must comply with the direction for use and provide the information to the third persons.

Respondents' contention that their status as bystanders makes this case a poor vehicle for review also ignores that numerous cases enforcing FIFRA preemption involve bystanders and other persons who were not purchasers or users of the pesticides. *E.g.*, *Grenier*, 96 F.3d 559 (purchasers of home built with logs treated with wood preservative); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995) (leasees of farmland previously treated with herbicide); *Lescs v. Dow Chem. Co.*, 976 F. Supp. 393 (W.D. Va. 1997) (purchaser of house treated with insecticide in connection

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3. For example, 40 C.F.R. § 156.210 requires labels for certain categories of pesticides to contain statements in the directions for use requiring oral warnings to workers and posting of warning signs.

with the sale), *aff'd mem.*, 168 F.3d 482 (4th Cir. 1999), *cert. denied*, 528 U.S. 1119 (2000).[4]

Respondents' alternative assertion, that this case is a poor vehicle for review because their claims involve information acquired after initial registration of the pesticides, overlooks core features of the pesticide registration and data submission process. FIFRA and EPA regulations contain extensive and ongoing data submission requirements for pesticide registrants. *See generally* 40 C.F.R. Part 158 (Data Requirements for Registration); *id.*, Part 159, Subpart D (Reporting Requirements for Risk/Benefit Information); 7 U.S.C. §§ 136a, 136d(a)(2) (continuing reporting requirements). Thus, the labeling for a pesticide may be changed after initial registration based upon new information. Cases enforcing FIFRA preemption frequently involve these fact patterns as well.[5]

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4. FIFRA cases enforcing preemption have involved bystanders in a wide variety of fact patterns. *See also, e.g.*, *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) (renters of house previously treated with insecticide); *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (mail carrier and drift from application of pesticide in corn field), *cert. denied*, 522 U.S. 928 (1997); *Hue v. Farmboy Spray Co., Inc.*, 127 Wash. 2d 67, 896 P.2d 682 (1995) (crop damage from pesticide drift); *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593 (Ind. Ct. App. 1996) (drift through office worker's window of herbicide applied on outside lawn); *Warner v. American Fluoride Corp.*, 204 A.D.2d 1, 616 N.Y.S.2d 534 (1994) (correctional officer working in facility treated with insecticides).

5. *See, e.g.*, *Grenier*, 96 F.3d at 561 (labeling for pesticide subsequently changed to delete the use at issue and add specific warning concerning such use); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 130 n.4 (4th Cir. 1995) ("if [plaintiffs'] claims were preempted

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III. RESPONDENTS' "PERCOLATION" PLEA HIGHLIGHTS THE THREAT TO FEDERAL POLICY.

Respondents' request that this Court "allow further percolation in the lower courts before acting on the issue of FIFRA preemption actually presented by this case" (Br. 11-12) highlights the threat to FIFRA's policy presented by the decision below. The only "issue of FIFRA preemption" presented is whether the term "requirements" in 7 U.S.C. § 136v(b) includes state law damages actions. That issue has fully percolated through the lower courts since 1992, when this Court twice remanded the issue for consideration in light of *Cipollone*. Pet. 12. By the time the issue was addressed by the Supreme Court of Montana in this case, the issue had percolated through nine federal circuit courts of appeals (several with multiple decisions) and fourteen state courts of last resort (including Montana twice). Pet. 12-13.

What respondents in fact mean by percolation is the continuing erosion of the federal statutory policy by lawsuits and court decisions based on the EPA *Amicus* Brief. They mean by percolation the continued threat of, and the imposition of, damages liability against pesticide manufacturers for not saying things about the pesticides in addition to or different

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in 1987 or 1989, they are still preempted, notwithstanding Sporicidin's voluntary withdrawal of its registration for [the product]"); *Davidson v. Velsicol Chem. Co.*, 108 Nev. 591, 834 P.2d 931, 932 (Nev.) ("after [the applicator] had sprayed the Davidson's home, Velsicol changed its label to provide a strict prohibition against broadcast spraying areas designated for crawl spaces"), *cert. denied*, 507 U.S. 1051 (1993).

from what is said in the federally-required labeling. No further percolation is needed. Because of the clear threat to federal policy, the Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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